ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1206, 20-1338, and 20-1339
(consolidated)

DELAWARE RIVERKEEPER NETWORK, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: MARCH 30, 2021

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The Parties before this Court are identified in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Adelphia Gateway, LLC*, "Order Issuing Certificates," 169 FERC ¶ 61,220 (Dec. 20, 2019), R.932, JA498–663 ("Certificate Order");

   and

2. *Adelphia Gateway, LLC*, "Order Denying Rehearing and Stay," 171 FERC ¶ 61,049 (April 17, 2020), R.955, JA842–916 ("Rehearing Order").

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no related cases pending elsewhere.

/s/ Jared B. Fish
Jared B. Fish

March 30, 2021

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GLOSSARY

A	Addendum
Br.	Opening brief of Petitioners Delaware Riverkeeper Network, West Rockhill Township, and Daniel and Sheila McCarthy
Certificate	Certificate of public convenience and necessity
CO_2	Carbon dioxide
CO_2e	Carbon dioxide equivalent
Commission or FERC	Respondent Federal Energy Regulatory Commission
Dekatherm	A unit of energy used to measure natural gas
NEPA	National Environmental Policy Act
P	Internal paragraph number in a FERC order
Quakertown Site	Proposed Quakertown compressor station site, located in Quakertown, Pennsylvania
Salford Site	Alternative to the Quakertown Site for a compressor station, located in Salford, Pennsylvania

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ON PETITIONS FOR REVIEW
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FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission ("Commission" or "FERC") issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Adelphia Gateway, LLC ("Adelphia"). That certificate authorizes Adelphia to construct and operate, subject to specified operational and

environmental conditions, a 93.3-mile-long natural gas pipeline spanning five Pennsylvania counties.

The Adelphia Gateway Project ("Adelphia Project" or "Project") comprises primarily existing pipeline and appurtenant facilities, and involves purchasing and repurposing 88.6 miles of pipeline previously owned by the Interstate Energy Company, LLC ("Interstate Energy"). Only 4.7 miles of pipeline—as well as two compressor stations and various other appurtenant facilities—will involve new construction.

The Project will allow Adelphia to continue existing service to the Martins Creek Terminal in Northampton County, Pennsylvania, where natural gas will—as previously—be used for electric power generation. It will also allow Adelphia to serve customers in southeastern Pennsylvania, namely the Marcus Hook Industrial Complex, and move gas that will be transferred to other, interconnecting pipelines via two new laterals. Adelphia executed long-term contracts ("precedent agreements"), mostly with existing shippers, for 76% of the Project's capacity.

Applying its policy statement on pipeline certificates, the Commission found that the public need for the Project—as reflected by

the precedent agreements—outweighed any adverse effects. The Commission also assessed the Project's potential environmental impacts—including related greenhouse gas emissions—and found that, if constructed and operated with the Commission's mandatory mitigation measures, the Project would not significantly impact the environment.

The questions presented for review are:

1. Did the Commission adequately explain its conclusion, under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, that the Adelphia Project is required by the "public convenience and necessity," in light of Adelphia's long-term contractual commitments for transporting natural gas on the Project, and based on its weighing of public benefits against adverse effects?

2. Did the Commission reasonably assess the Project's potential environmental impacts—namely, greenhouse gas emissions, impacts from the Quakertown compressor station, and alternatives—consistent with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA")?

3. Did the Commission act consistent with the United States Constitution in declining to grant a municipality a veto over its authorization of the Project?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the Addendum.

JURISDICTIONAL STATEMENT

The Commission agrees with the statement of jurisdiction advanced by Petitioners in their opening brief, except that the Court lacks jurisdiction to consider the arguments of Sheila and Daniel McCarthy, to the extent the Commission found that they were not properly presented to the agency on rehearing. *See infra* at pp.63–68.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "encourage the orderly development of plentiful supplies of … natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669–70 (1976). To that end, sections 1(b) and (c) of the Act vest in the Commission jurisdiction

over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a certificate of public convenience and necessity ("Certificate") under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted" by the Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

Section 7(e) of the Act provides that the Commission shall issue a Certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the [C]ertificate … such reasonable terms and conditions as the public convenience and necessity may require." *Id*.

B. The National Environmental Policy Act

An application for a Certificate triggers the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. §§ 4321, *et seq*. NEPA establishes procedures that federal agencies must follow to ensure that the environmental impacts of a proposed federal action are

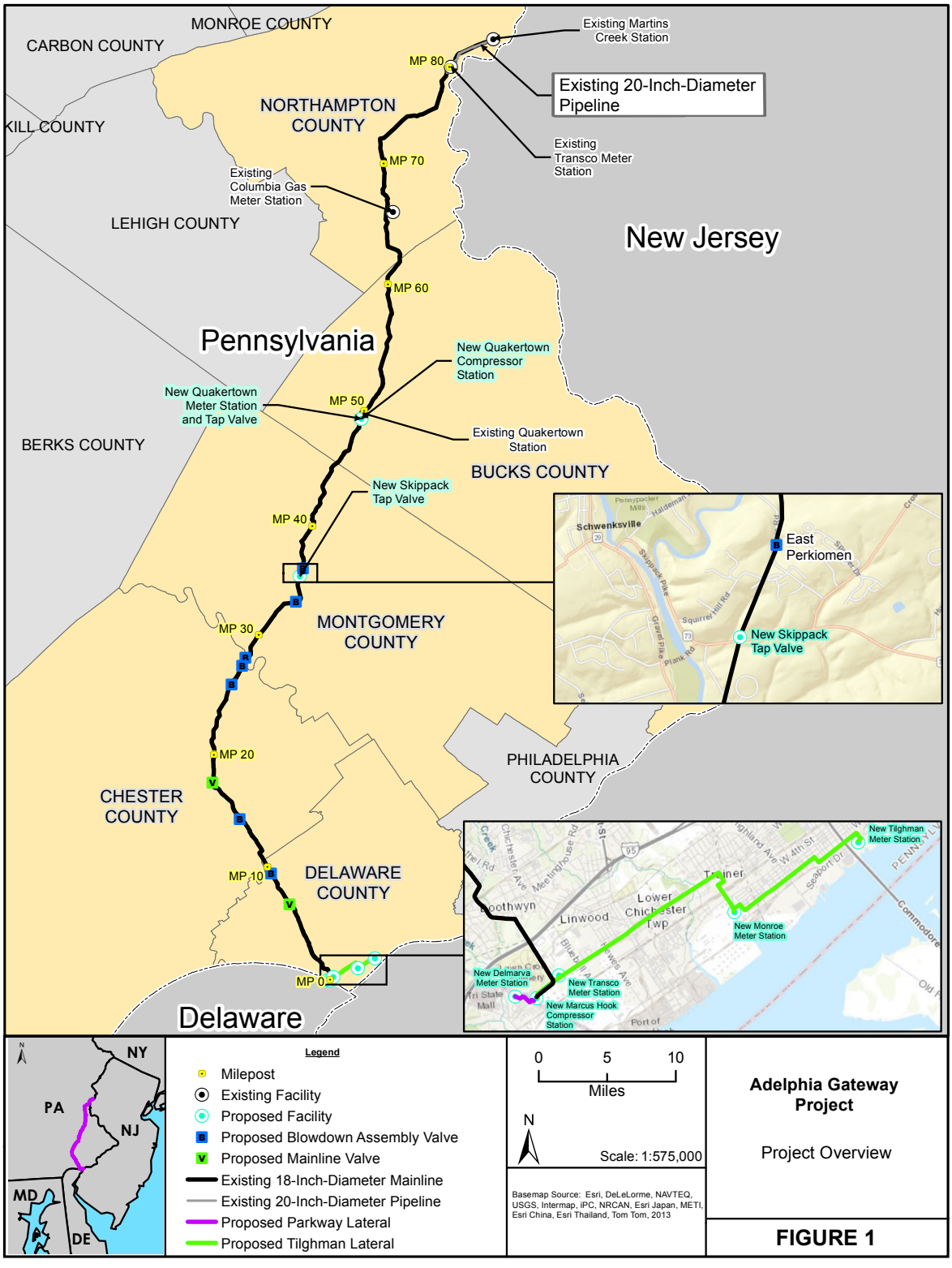
"adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756–57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA's implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment—if accompanied by a finding of no significant impact—or an environmental impact statement. *See* 40 C.F.R. §§ 1508.9; 1508.13.

II. Commission review of the Project

On January 12, 2018, Intervenor Adelphia Gateway, LLC ("Adelphia") filed an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity to acquire, construct, and operate an interstate pipeline system. *Adelphia Gateway, LLC*, "Order Issuing Certificates," 169 FERC ¶ 61,220, P 1

(2019), R.932, JA498 ("Certificate Order"). The majority of the Adelphia Project—extending in total 93.3 miles—comprises existing pipeline and appurtenant facilities previously operated by Interstate Energy. *Id*. P 4, JA499–500. The Project also involves several pieces of new construction: (1) two new pipeline laterals at the southern end totaling 4.7 miles (the Parkway and Tilghman Laterals), (2) two new compressor stations (the Marcus Hook compressor station and the Quakertown compressor station), (3) several meter stations, and (4) other appurtenant facilities. *Id*. P 6, JA500–01; *Adelphia Gateway, LLC*, "Order Denying Rehearing and Stay," 171 FERC ¶ 61,049, P 122 (2020), R.955, JA896–97 ("Rehearing Order"). The Project is depicted below in "Figure 1."



Source: FERC, "Adelphia Gateway Project Environmental Assessment," FERC Dkt. No. CP18-46, at 5 (Jan. 4, 2019), R.626, JA87.

The Project will operate in three zones: Zone North A, Zone North B, and Zone South. Certificate Order, P 7, JA501–02. Zone North A, consisting of 34.8 miles of existing pipeline, extends northward from an existing interconnection with the Texas Eastern Transmission Company ("Texas Eastern") pipeline in Bucks County, Pennsylvania, and terminates at the Martins Creek Terminal. *Id*. Zone North B, consisting of 4.4 miles of existing pipeline, extends northward from an interconnection with the Transcontinental Gas Pipe Line Company ("Transco") pipeline in Northampton County, Pennsylvania, and also terminates at the Martins Creek Terminal. *Id*. The existing pipelines will continue, as they did under Interstate Energy's ownership, to serve power plants at the Martins Creek Terminal with the same volumes of natural gas. *See id*. PP 5, 249, JA500, 599–600.

The Zone South system includes the longest pipeline segment—at 49.4 miles—and includes the Project's new construction. *Id*. P 7, JA501–02. Zone South extends southward from the terminus of the Zone North A system in Bucks County, Pennsylvania, and terminates at the Marcus Hook Industrial Complex in Delaware County, Pennsylvania. *Id*. It includes the new Tilghman and Parkway Laterals,

and the Marcus Hook and Quakertown compressor stations. *Id*. The Parkway Lateral feeds gas to interconnects with two other pipelines, namely Columbia Gas Transmission and Texas Eastern, and to two power plants operated by Calpine Corporation. *Id*. PP 6 & n.10, 7, 246, 249, JA500–02, 598–600. Similarly, the Tilghman Lateral sends gas to pipelines owned by Transco and PECO Energy Company ("PECO"). *Id*. P 6, JA500–01. PECO has contracted for delivery of 22,500 dekatherms/day of gas to serve the Kimberly-Clark cogeneration power plant in Chester, Pennsylvania. *Id*. P 255, JA602.

The Zone North A and Zone South systems can provide up to 250,000 dekatherms/day of firm natural gas transportation service,[1] and the Zone North B system can provide up to 350,000 dekatherms/day. *Id*. P 7, JA501–02.

Adelphia held an open season for proposed firm transportation service on the Project between November and December 2017. *Id*. P 9, JA502. Adelphia subsequently executed binding precedent agreements

[1] "'Firm' transportation service is guaranteed, while 'interruptible' transportation service is not." *Ga. Indus. Grp. v. FERC*, 137 F.3d 1358, 1360 n.6 (D.C. Cir. 1998).

for approximately 76% of the Project's firm transportation capacity. Rehearing Order, P 12, JA846–47.

On May 1, 2018, the Commission issued a notice of intent to prepare an Environmental Assessment for the Project under NEPA and requested comments. Certificate Order, P 80, JA528–29. Thereafter, Commission staff conducted public scoping sessions to afford the public an opportunity to learn more about the Project and to comment on environmental concerns. *Id*.

On January 4, 2019, the Commission published its Environmental Assessment and invited comments. *Id*. P 83, JA529–30. The Assessment studied, among other things, potential impacts related to water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, air quality, noise, safety, greenhouse gas emissions, cumulative impacts, and alternatives. *Id*. P 82, JA529. The Commission responded to comments on the Assessment in the Certificate Order. *See id*. P 83, JA529–30.

On December 20, 2019, the Commission issued Adelphia its requested Certificate. *Id*. P 2, JA498. The Certificate Order agreed with the conclusions presented in the Environmental Assessment and

adopted its recommended mitigation measures, as modified by the Certificate Order. Rehearing Order, P 6, JA844. The Order concluded that, if the Project is constructed and operated according to terms and conditions set forth in the Assessment and appended to the Order itself, it would not have a significant environmental impact and was required by the public convenience and necessity. *Id*.

The Order includes measurements of reasonably foreseeable downstream greenhouse gas emissions from combusting natural gas at the Kimberly-Clark power plant. Certificate Order, P 255, JA602. The Commission explained that, because an executed precedent agreement committed natural gas service to that facility, it had a reasonable basis for quantifying indirect emissions from transporting that gas. *Id*. PP 249, 255, JA599–600, 602. However, the Commission declined to measure indirect emissions from the Parkway Lateral's service of the Calpine power plants. It explained that, because no precedent agreements committed gas to those facilities, it could not reasonably quantify how much—if any—Project gas would be combusted at those plants. *See* Rehearing Order, P 125, JA898–99; *see also* FERC, "Adelphia Gateway Project Environmental Assessment," FERC Dkt. No.

CP18-46, at 132 n.39 (Jan. 4, 2019), R.626, JA132 ("Environmental Assessment") ("The Parkway Lateral … *may* serve Calpine Corporation's power plants[.]" (emphasis added)).

Commissioner (now Chairman) Glick filed a partial dissent, voicing disagreement with the Commission's consideration of the Project's climate change-related impacts. *See* Certificate Order, Dissent P 1, JA619. Commissioner McNamee filed a concurring statement, asserting that the Commission complied with its responsibilities under the Natural Gas Act and NEPA. *See id*., Concurrence P 1, JA627.

Delaware Riverkeeper Network ("Delaware Riverkeeper"), the West Rockhill Township (the "Township"), and Sheila and Daniel McCarthy (the "McCarthys") (collectively, "Petitioners") timely filed applications for agency rehearing. Rehearing Order, P 1, JA842. The Commission denied the rehearing applications of Delaware Riverkeeper and the Township, *id*. & Ordering P (A), JA842, 904, and dismissed the McCarthys' rehearing application as deficient, *id.* P 7 & Ordering P (B), JA844–45, 904. Commissioner Glick again dissented in part, disagreeing with the majority's analysis of Project-related greenhouse gas emissions. *See id*., Dissent P 1, JA905.

Petitioners filed three separate petitions for review in the Courts of Appeals for the Third Circuit and the D.C. Circuit, which were consolidated in this Court pursuant to 28 U.S.C. § 2112(a)(1).

SUMMARY OF ARGUMENT

The Commission approved Adelphia's application to construct and operate a natural gas pipeline because it found it to be consistent with the public convenience and necessity. It made that determination after balancing the public benefits of the Adelphia Project against its potential adverse effects, and after conducting a thorough environmental review. Petitioners' objections reflect their preference for a different balancing of record facts and considerations, but do not demonstrate that the Commission failed to make a reasoned decision based on substantial evidence in the record.

First, under the Natural Gas Act, the Commission adhered to its longstanding policy in crediting Adelphia's long-term contracts for natural gas transportation on the Project ("precedent agreements") as conclusive evidence of market demand. This Court has repeatedly ratified that approach, and Delaware Riverkeeper fails to confront the relevant precedent. Instead, it offers alternative yardsticks of market

need that misapprehend agency policy and which the Commission, in any event, rejected here as inadequate.

The Commission also weighed the Project's public benefits against potential adverse effects. It considered, among other things, the Project's impacts on natural gas prices, landowners, and surrounding communities. Because (1) more than 95% of the Project's length would consist of existing pipeline, (2) approximately 81% of the 4.7 miles of new pipeline would be adjacent to existing rights-of-way, and (3) both new compressor stations would be placed at existing facility sites, the Commission reasonably found that the demonstrated public need outweighed potential adverse effects. Delaware Riverkeeper's wide-ranging rejoinders are meritless because, among other things, they misapprehend the Commission's balancing of relevant considerations and misconstrue the Commission's assessment of health and safety impacts.

Second, in implementing the National Environmental Policy Act, the Commission issued an Environmental Assessment that analyzed the Project's likely direct, indirect, and cumulative effects. It reasonably found that it could not measure new natural gas production caused by

the Project (upstream indirect effects), because the record lacks data on the likely locations of any Project-induced new natural gas wells.

The Commission also considered downstream greenhouse gas emissions resulting from the combustion of natural gas transported by the Project. Consistent with this Court's precedent, the Commission quantified emissions from contracted-for gas destined for the Kimberly-Clark power plant, because such emissions are reasonably foreseeable. But it declined to quantify emissions resulting from gas transported via the new Parkway Lateral to two existing Calpine power plants. Because no contracts existed for *any* gas transportation to the plants, the Commission reasonably found that it could not quantify Project-related emissions from those facilities.

Also consistent with this Court's precedent, the Commission declined to quantify emissions where the transported gas's end-use was unknown. The Commission made that determination after seeking end-use data from Adelphia, which responded that it lacked such information.

The Commission also explained why it lacked a reliable technique for measuring the climate change-related impacts of emissions that it

could quantify. Delaware Riverkeeper insists the Commission should have used the Social Cost of Carbon tool, but the Commission's logic in declining to do so is similar to that upheld in other cases. And Delaware Riverkeeper forfeits any argument that the Commission should have employed an alternative Ecosystem Services Analysis because it fails to develop it. In any event, the Commission explained why the latter metric, which involves monetizing environmental impacts, is inappropriate for project-level decisionmaking.

Nor did the Commission unlawfully "segment" its environmental review of the Project. Delaware Riverkeeper argues that the Commission should have considered the Project's environmental impacts together with those of another pipeline, the PennEast Project. But the two projects lack the geographic commonality and interdependent utility necessary to press such a claim.

The Commission also took the requisite "hard look" at the environmental impacts of choosing the proposed Quakertown Site for one of the two new compressor stations, after considering alternative locations. Arguments advanced by the Township and the McCarthys—to the extent they are not waived or forfeited—rely on misstatements of

the record, vague allegations, and misapprehensions of FERC's NEPA obligations.

Finally, the Township's plea for relief under the United States Constitution is both waived and wrong. The Supremacy Clause gives localities *no* veto over congressionally-authorized federal agency action. To the contrary, the Natural Gas Act confers upon the Commission exclusive authority over natural gas facilities used in interstate commerce—including those the Commission authorized here.

ARGUMENT

I. Standards of review

The Court analyzes FERC orders under the deferential "arbitrary and capricious standard of the Administrative Procedure Act[, 5 U.S.C. § 706(2)]." *Missouri River Energy Servs. v. FERC*, 918 F.3d 954, 957 (D.C. Cir. 2019) (internal quotations omitted). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for

its action, including a rational connection between the facts found and the choice made." *Id*. (cleaned up).

Because the grant or denial of a Natural Gas Act section 7 certificate of public convenience and necessity is within the Commission's discretion, the Court does not substitute its own judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a "clear error of judgment." *Id*. (internal quotations omitted).

The Commission's factual findings are reviewed under the "substantial evidence" standard. *Id*. at 1309 (internal quotations omitted). "The standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Id*. (internal quotations omitted). Further, the question is not "whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010).

The arbitrary and capricious standard also applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97–98).

Agency actions taken under NEPA are entitled to a high degree of respect. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377–78 (1989). The Court evaluates agency compliance with NEPA under a "rule of reason" standard, and does not "flyspeck" the Commission's environmental analysis. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (internal quotations omitted). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. The Commission reasonably found that the Project is required by the "public convenience and necessity"

Section 7(e) of the Natural Gas Act vests in the Commission broad discretion to decide whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *see also Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission "vested with wide discretion to balance competing equities against the backdrop of the public interest"); *see also FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority" (internal quotations omitted)).

The Commission's 1999 Certificate Policy Statement ("Policy Statement") sets forth the criteria for its review of a Certificate application under Natural Gas Act section 7. *See City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019). First, the applicant must show that "it is 'prepared to develop the project without relying on subsidization by the sponsor's existing customers.'" *Id*. (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,750 (1999)). Second, if the applicant makes this showing, then FERC balances the project's public

benefits against its adverse economic effects. *Id*.; *see also Myersville*, 783 F.3d at 1309 (observing that the balancing of adverse effects and public benefits of a proposed project is primarily "'an economic test'" under FERC policy (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,745)). After also reviewing and considering a project's potential environmental impacts, FERC will grant a certificate of public convenience and necessity if the benefits outweigh the negative effects. *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) *("Sabal Trail")*.

A. The Commission reasonably relied on Adelphia's precedent agreements to find a market need for the Project

The Commission found that the first test set forth in the Certificate Policy Statement—whether the project will stand on its own financially without subsidization from existing customers—does not apply where, as here, Adelphia is a new company with no existing customers. Certificate Order, P 22, JA506. "[A]s such, there is no potential for subsidization." *Id*. Petitioners did not seek rehearing of this determination and they do not challenge it here. Instead, Delaware

Riverkeeper focuses on a perceived lack of market need for the Project. Br. 72–74.

This argument misapprehends the agency's approach. The Commission's Policy Statement explains that precedent agreements, while not required, "are still significant evidence of demand for the project." Policy Statement, 88 FERC ¶ 61,227, at 61,748; *see also* Certificate Order, P 35, JA511–12. Courts of appeals, including this one, have repeatedly affirmed the Commission's reliance on these agreements (including those with affiliates) as valid evidence of demand. *See, e.g.*, *Birckhead v. FERC*, 925 F.3d 510, 517–18 (D.C. Cir. 2019) (per curiam) ("We have repeatedly held that a project applicant may demonstrate market need by presenting evidence of preconstruction contracts for gas transportation service." (internal quotations omitted)); *Sabal Trail*, 867 F.3d at 1379; *Minisink*, 762 F.3d at 111 n.10; *see also Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'" (quoting *Minisink*, 762 F.3d at 111 n.10)).

Here, the Commission adhered to the Policy Statement in finding that Adelphia's precedent agreements sufficed to demonstrate market need. *See* Rehearing Order, P 12, JA846–47. Indeed, binding contracts with shippers represent commitments for 76% of Project capacity. *Id.*; *see also City of Oberlin*, 937 F.3d at 605 (upholding, in relevant part, FERC's determination that precedent agreements representing 59% of a pipeline's capacity "were the best evidence of project need"). Further, the Commission found that existing pipelines were "fully subscribed," meaning they could not be used as alternatives for providing additional capacity to the area Adelphia proposes to serve. Certificate Order, P 40, JA514; *see also City of Oberlin*, 937 F.3d at 605 (observing that "the Commission determined that existing pipelines could not absorb" the contracted-for gas). Accordingly, the Commission reasonably relied on Adelphia's precedent agreements with shippers as adequate evidence of market need. *See City of Oberlin*, 937 F.3d at 605.

B. The Commission reasonably addressed the evidence presented by Delaware Riverkeeper

Notwithstanding the Commission's fidelity to its longstanding policy, Delaware Riverkeeper insists the Commission should have relied

on other factors that allegedly show a lack of market need. *See* Br. 72–74.

Delaware Riverkeeper stumbles at the threshold by misapprehending the Policy Statement. *See* Br. 73–74. The Statement's declaration that, "'[r]ather than relying on one test for need, the Commission will consider all relevant factors reflecting on the need for the project,'" (quoted at Br. 73) confers rather than confines FERC's discretion. *See* Policy Statement, 88 FERC ¶ 61,227, at 61,747. The Statement is written permissively: "These [factors] *might* include, but would not be limited to, precedent agreements, demand projections, [etc.]." *Id*. (emphasis added). Nowhere does the Statement require the Commission to consider *all* potentially relevant factors. Nor has this Court. *See supra* at p.23.

In any event, the Commission *did* address Delaware Riverkeeper's alternative metrics. It explained that, notwithstanding assertions of "sufficient existing capacity to meet customer needs," additional pipelines are "fully subscribed." Certificate Order, P 40, JA514. The Commission also explained that, as this Court has confirmed, it was not required to "look behind precedent or service agreements to make

judgments about the needs of individual shippers." *Myersville*, 783 F.3d at 1311 (internal quotations omitted); Rehearing Order, P 12, JA846–47.

Nor did the Commission find persuasive Delaware Riverkeeper's concern of pipeline "overbuild[ing]." *See* Br. 74. Delaware Riverkeeper misconstrues the Policy Statement as rejecting the "'amount of capacity under contract'" as a sufficient indicator of market need. Br. 74 (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,744). In fact, the quotation pertains to the Commission's determination that contracted-for capacity does not, standing alone, adequately capture all of a project's *benefits*. 88 FERC ¶ 61,227, at 61,744.

In any event, the Commission explained that concerns with overbuilding turn on speculative, future demand estimates. *See* Rehearing Order, PP 15–16, JA848–49. And because projections of future demand "often change and are influenced by" many variables, such as "economic growth, the cost of natural gas, [and] environmental regulations," the Commission reasonably deems "precedent agreements" to be "the better evidence of demand," as it did here. *Id*. P 16, JA848–49.

C. The Commission reasonably balanced the Project's adverse effects and public benefits under the Natural Gas Act and Commission policy

The Natural Gas Act confers on the Commission broad authority in making public interest determinations. *See Transcon. Gas Pipe Line*, 365 U.S. at 7; *Columbia Gas Transmission*, 750 F.2d at 112. Here, the Commission reasonably explained its finding that the Project is consistent with the public interest.

The Policy Statement requires the Commission to "balance[] the adverse effects [of a project] with the public benefits of the project, as measured by an 'economic test.'" *Myersville*, 783 F.3d at 1309 (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,745). "Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property." *Id*. (citing Policy Statement, 88 FERC ¶ 61,227, at 61,747–48). "Public benefits may include," among other things, "'meeting unserved demand, … lower costs to consumers, providing new interconnects that improve the interstate grid, [and] providing competitive alternatives.'" *Id*. (quoting Policy Statement, 88 FERC ¶ 61,227, at 61,748).

The Commission executed that balancing test here. It assessed the Project's impacts on the price of natural gas, landowners, and surrounding communities. Rehearing Order PP 22, 26, JA851–53. It concluded that Adelphia had committed to taking sufficient steps to minimize landowner and community effects, and that the Project would not increase the price of natural gas. *Id*. As the Commission explained, most of the Project would simply use existing infrastructure, and new segments would have minimal land-use impacts. *See id*. P 26, JA852–53. Indeed, more than 95% of the Project's length would consist of existing pipeline, approximately 81% of the 4.7 miles of new pipeline would be located adjacent to existing rights-of-way, and both new compressor stations are proposed at existing facility sites. *Id*. Accordingly, exercising its broad discretion, the Commission reasonably concluded that the demonstrated public need for the Project outweighed any potential adverse economic effects. *See id*. PP 26, 28–29, 32, JA852–55. That satisfies the substantial evidence standard. *See Myersville*, 783 F.3d at 1309 (explaining substantial evidence "requires more than a

scintilla, but can be satisfied by something less than a preponderance of the evidence" (internal quotations omitted)).

Delaware Riverkeeper responds with an array of meritless arguments. For example, it alleges that the Commission failed to adequately assess adverse effects because, it reasons, the Commission's environmental review violated NEPA. *See* Br. 75–76. But, pursuant to the Policy Statement, the Commission balances adverse economic effects against public benefits to determine whether a natural gas infrastructure proposal complies with the Natural Gas Act's public interest requirement. *Myersville*, 783 F.3d at 1309; *see also* Rehearing Order, P 28, JA853–54 (citing Policy Statement, 88 FERC ¶ 61,227, at 61,745). This "economic test" occurs *before* "the Commission proceeds to environmental review" under NEPA. *Id*.; Policy Statement, 88 FERC ¶ 61,227 at 61,745 ("Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered."). And, in any event, the Commission *did* consider the Environmental Assessment's analysis of Project impacts in affirming

the conclusion of its balancing test. *See* Rehearing Order P 28, JA853–54; *see also* Certificate Order, P 264, JA607.

Delaware Riverkeeper also accuses FERC of unlawfully granting Adelphia a Certificate "because it authorized an inherently unsafe land use on an impermissibly small site that is directly adjacent to a residential community." Br. 76. But this conclusory assertion of adverse effects makes no argument that the Commission failed to *balance* benefits *against* those effects. *See Myersville*, 783 F.3d at 1309. It is also forfeited for failure to include any "'citations to the authorities and parts of the record on which the [petitioner] relies.'" *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (quoting Fed. R. App. P. 28(a)[(8)](A)); *see also CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (deeming petitioner's "oblique," "conclusory" challenge to be forfeited).

Nor does Delaware Riverkeeper succeed in arguing that the Commission failed to consider "public health, safety, and welfare." Br. 76. In fact, as discussed *infra* at pp.76–77, the Commission undertook a detailed analysis of public health and safety impacts. *See, e.g.*, Certificate Order, PP 219–21, JA585–87; Rehearing Order, P 109,

JA891 (explaining that the pipeline would be operated, maintained, and designed according to federal safety standards, and explaining that the Environmental Assessment assessed the risk of pipeline ruptures); Rehearing Order, P 114, JA892–93 (discussing the Commission's air pollution modeling); *id*. P 116, JA893–94 (addressing emergency response procedures); *id*. PP 98–107, JA887–91; Certificate Order, P 213, JA583–84 (discussing analysis of noise emitted from the Quakertown compressor station, and standards imposed to minimize noise pollution).

Finally, Delaware Riverkeeper insists that approval of a compressor station at the Quakertown Site "r[uns] counter to the evidence before it." Br. 77. But it fails to identify a disconnect between the Commission's choice of the Quakertown Site and any particular piece of record evidence, meaning the argument is forfeited. *See Missouri River*, 918 F.3d at 960 (argument forfeited where petitioner "failed to fully develop it"); *Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) ("[An] argument first appearing in a reply brief is forfeited.").

III. The Commission's environmental review fully complied with the National Environmental Policy Act

NEPA's implementing regulations require the Commission to analyze direct, indirect, and cumulative impacts of a proposed action. 40 C.F.R. § 1508.25(c). *Indirect impacts* are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b); *see also Pub. Citizen*, 541 U.S. at 767 ("NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause," akin to the "familiar doctrine of proximate cause from tort law." (internal quotation marks omitted)); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) ("To warrant consideration under NEPA, an effect had to be sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." (cleaned up)).

Cumulative impacts are those that would result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

NEPA's regulations also require environmental assessments to include a "brief" discussion of reasonable alternatives to the proposed action. *See id*. § 1508.9(b).

Delaware Riverkeeper argues that the Commission's Environmental Assessment of the Project was arbitrary and capricious in several respects. None of its claims have merit.

A. The Commission reasonably issued an Environmental Assessment, rather than an Environmental Impact Statement

A "major Federal action[]" under NEPA is one that "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(C). As such, it triggers preparation of a comprehensive Environmental Impact Statement. *Id*.; *see also Myersville*, 783 F.3d at 1322. But "[a]n agency may preliminarily prepare an Environmental Assessment [] to determine whether the more rigorous [Environmental Impact Statement] is required." *Myersville*, 783 F.3d at 1322 (citing 40 C.F.R. §§ 1501.4, 1508.9). An Environmental Assessment's finding that a Project will have "no significant impact" obviates the need for the more involved analysis and "discharges the agency's NEPA obligations." *Id*. (citing 40 C.F.R. §§ 1508.9(a)(1); 1508.13; 18 C.F.R. § 380.2(g)).

Delaware Riverkeeper argues that the Commission was required to develop a full-fledged Environmental Impact Statement, rather than rely on its Environmental Assessment. Br. 18–20. It reasons that the Adelphia Project is a "major Federal action[]," and that the Commission failed to consider all of the Project's direct, indirect, and cumulative effects. *See, e.g.*, Br. 19–20.

By assuming that the Project *is* a "major Federal action[]," Delaware Riverkeeper ignores the prefatory inquiry into *whether* that is so. And, as discussed below, Delaware Riverkeeper fails to show that the Commission violated rules of reasoned decisionmaking in deciding that the Project will have no significant impact on the human environment. *See, e.g.*, Certificate Order, P 264, JA607 (explaining that, if the Project is implemented according to the mitigative conditions appended to the Certificate Order, it would "not constitute a major federal action significantly affecting the quality of the human environment"); Rehearing Order, P 32, JA855.

Nor does Delaware Riverkeeper's invocation of direct, indirect, and cumulative effects offer an assist. Regardless of whether it conducts an Environmental Assessment or full-fledged Environmental Impact

Statement, the Commission must *always* assess direct, indirect, and cumulative effects. *See* 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1508.8; 1508.9; 1508.25; *see also Birckhead*, 925 F.3d at 516–17 (requiring consideration of direct and indirect effects under an Environmental Assessment); *Myersville*, 783 F.3d at 1326 (requiring consideration of cumulative impacts under an Environmental Assessment). The relevant questions here are whether, *under* the Environmental Assessment, the Commission (1) adequately accounted for direct, indirect, and cumulative effects, as well as "connected actions" and "similar actions" (40 C.F.R. §§ 1508.8; 1508.25(a)(1)–(3)); (2) adequately considered "reasonable alternatives to the proposed action" (*id*. § 1508.9(b)); and, after addressing those issues, (3) reasonably found that the Project would have "no significant impact" (*id*. §§ 1508.9(a)(1); 1508.13; 18 C.F.R. § 380.2(g)). *See Birckhead*, 925 F.3d at 515–17; *Myersville*, 783 F.3d at 1322–23, 1326.

As discussed below, the answer to all of the above is "yes," thereby "discharg[ing] the [Commission's] NEPA obligations." *Myersville*, 783 F.3d at 1322.

B. The Commission reasonably assessed the Project's upstream indirect effects

Delaware Riverkeeper argues that the Commission failed to consider upstream indirect effects of the Project—specifically, induced natural gas production. Br. 20–21. It cites several cases—unrelated to natural gas production and transportation—for the proposition that expanding a pipeline will cause construction of new natural gas wells. *See id*. at 22–24.

The Commission explained, however, why expanded upstream natural gas production is not a reasonably foreseeable consequence of the Project. The record contains "only general information regarding drilling in the region," and the specific source of the gas to be transported by the Project is "currently unknown and will likely change throughout [its] operation." Certificate Order, P 243, JA596–97; *see also* Rehearing Order, P 123, JA897–98 (explaining that the Project will receive gas from other interstate pipelines, meaning the specific source of natural gas to be transported is unknown). Thus, the Commission reasonably found that it lacked the requisite data to estimate *where* any new gas wells—assuming the Project would induce their construction at all—would be located. *See* Rehearing Order, P 123, JA897–98.

Delaware Riverkeeper's lone record citation (Br. 25) in opposition is inapposite. It references a table listing (in gross form) "proposed and reported natural gas wells in [all of] Pennsylvania." *Compare* Delaware Riverkeeper Comments, FERC Dkt. No. CP18-46, at "Appendix 1, Table A-1" (filed Feb. 5, 2019), R.830, JA445–46, *with* Br. 25. But far from illuminating where "new wells are likely to be located" as a result of the Project (*see* Br. 25), the table does not purport to tie new natural gas production to the Project *at all*. *See* Delaware Riverkeeper Comments at "Appendix 1, Table A-1," JA445–46. If anything, its footnote reference to "PennEast Well Drilling Impacts" suggests its relevance, if any, is to a different pipeline altogether. *See id*.

The confusing table aside, the Court has declined to require the type of agency guess-work that Delaware Riverkeeper demands. In *Birckhead*, which involved similar facts in relevant part, the Court accepted as sufficient the explanation that the Commission offers here: that the environmental effects of any upstream gas production induced by that pipeline project were "not … reasonably foreseeable because the source area for the gas … [wa]s ill-defined and 'the number or location of any additional wells [we]re matters of speculation.'" 925 F.3d at 517

(quoting *Tenn. Gas Pipeline Co.*, 156 FERC ¶ 61,157, P 82 (2016)). Indeed, the "interconnected" nature of the natural gas "pipeline system" "means every natural-gas-producing region in the country is a potential source for new gas wells in order to" serve a particular natural gas project. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (upholding agency's declination to forecast the location of induced upstream natural gas production caused by exporting natural gas).

The Commission went even further here in assessing induced production, and highlighted a lack of evidence linking the Adelphia Project to *any* new well construction. Certificate Order, P 243, JA596–97; Rehearing Order, P 123, JA897–98. For example, the record lacks data showing that, without Project approval, natural gas "would not be brought to market by other means." Certificate Order, P 243, JA596–97. In other words, that the Project will receive gas from *other* pipelines, rather than beginning at, say, a new natural gas production field, confounds an analysis of induced well construction caused by *this* Project. *See id.*; *cf. Mid-States Coal. For Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (cited at Br. 22–23 and Rehearing Order, P 122, JA896–97) (agency found that increased availability of

coal was, unlike here, a reasonably foreseeable consequence of a rail-line extension, meaning it was obliged to consider its environmental impact).

Birckhead approved this particular analysis, too. There, as here, the record lacked evidence that the proposed project "represent[ed] the *only* way to get additional gas 'from a specified production area' into the interstate pipeline system." 925 F.3d at 517 (quoting *Tenn. Gas Pipeline Co.*, 156 FERC ¶ 61,157, P 68). Thus, the "reasonably close causal relationship" necessary to qualify as an "indirect effect" under NEPA did not exist. *Id*. (internal quotations omitted).

Birckhead also declined to require FERC to ask the pipeline company whether *it* knew of additional well development caused by the proposed project. *See id*. at 517–18. The Court held that petitioners failed to show that this "constitutes a violation of [FERC's] obligations under NEPA." *Id*. at 518. Nor does Delaware Riverkeeper attempt to do so here.

Finally, Delaware Riverkeeper fares no better by invoking the Natural Gas Act's public convenience and necessity standard. *See* Br. 26–27. Contrary to its suggestion, the D.C. Circuit has never found that the Natural Gas Act requires speculating on new gas production

caused by a pipeline project. *See id*. *Public Service Commission of New York v. FPC*, cited by Delaware Riverkeeper (Br. 26), simply confirms the unremarkable fact that "conservation [i]s relevant to [the] public convenience and necessity." 373 F.2d 816, 821 (D.C. Cir. 1967). Indeed, ratifying Delaware Riverkeeper's view would run headlong into this Court's precedent rejecting just such hypothesizing under NEPA. *See Birckhead*, 925 F.3d at 517–18. The Natural Gas Act demands record-based decisionmaking, not theoretical conjecture. *See Myersville*, 783 F.3d at 1314.

C. The Commission reasonably assessed the Project's downstream indirect effects

1. "'[R]easonably foreseeable'" greenhouse gas emissions from combusting natural gas transported by a proposed pipeline qualify as an "indirect effect" of the project. *Birckhead*, 925 F.3d at 516–19 (quoting 40 C.F.R. § 1508.8(b)). "The phrase 'reasonably foreseeable' is the key here." *Sabal Trail*, 867 F.3d at 1371. "Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Id*. (internal quotations omitted).

Here, the Commission found that gas destined for a particular power plant—the Kimberly-Clark facility—fell into this category, because its destination and end-use were known. *See* Certificate Order, P 255, JA602; Rehearing Order, P 125 n.396, JA899. But it did not speculate on likely emissions where the record did not evince a known destination for contracted-for gas, or where the destination was known but there was *no* contracted-for gas. *See* Certificate Order, P 249, JA599–600; Rehearing Order P 125, JA898–99.

The Commission hewed closely to this Court's recent precedent in making its findings. The Court has explained that downstream emissions may be reasonably foreseeable if the destination and end-use of transported gas are known. *See Birckhead* 925 F.3d at 519–20 (describing information on the "destination and end use of" transported gas as "the missing information" that the Commission "sa[id] it would need" to quantify downstream emissions). But because such information is not always available, the Court has squarely rejected the argument that "emissions from downstream gas combustion are, as a categorical matter, *always* a reasonably foreseeable indirect effect of a pipeline project." *See id*. at 519 (emphasis added) (quoting *Calvert*

Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971), for the proposition that "NEPA compels a case-by-case examination … of discrete factors").

2. Adelphia signed precedent agreements with four natural gas shippers. Certificate Order, P 249, JA599–600. The Commission found that two of those agreements—totaling 175,000 dekatherms/day on the Zone North A system and 350,000 dekatherms/day on the Zone North B system—"are designed to replicate service currently being provided, and therefore, will not alter the downstream usage of the gas being provided by the facilities." *Id*. Such a finding satisfies the Commission's NEPA obligations related to those volumes of gas, and Delaware Riverkeeper does not argue otherwise.

Another precedent agreement commits 100,000 dekatherms/day on the Zone South system. *Id*. Consistent with this Court's directive that the Commission make an effort "to obtain … missing information" from the applicant pipeline on "the destination and end use" of contracted-for gas, the Commission asked Adelphia if it had that information. *See Birckhead*, 925 F.3d at 519–20; *see also* Adelphia Response to Staff Data Request, FERC Dkt. No. CP18-46, at 2 (filed July

27, 2018), R.484, JA33 ("Adelphia July 2018 Data Response"). Adelphia responded that the gas would be delivered for further transportation on the interstate grid and that its end-use was unknown. Certificate Order, P 249 & n.550, JA599–600 (citing Adelphia July 2018 Data Response at 2, JA33). Thus, the Commission reasonably concluded that emissions associated with the ultimate combustion of the 100,000 dekatherms/day of Zone South gas "are not reasonably foreseeable." *Id.*; *see also Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1144 (D.C. Cir. 1991) (agency satisfied NEPA where it "ma[de] reasonable efforts to acquire relevant information").

3. Delaware Riverkeeper objects. It begins by seizing on Adelphia's data response that the new "Parkway Lateral will serve to directly connect the Adelphia system with two existing Calpine Corporation ('Calpine') power plants" to provide those facilities "an alternative source of gas." Adelphia July 2018 Data Response at 1, JA32; *see also* Br. 27–28. Delaware Riverkeeper reasons that because some gas on the Zone South system *could* be delivered to Calpine's plants, the Commission must quantify emissions from combusting gas at those facilities. *See* Br. 27–28.

But sometimes it really is as much about the journey as it is about the destination. *Cf. Sabal Trail*, 867 F.3d at 1371 ("It's not just the journey, though, it's also the destination."). The record lacks evidence that gas will actually flow through the Parkway Lateral to the Calpine plants: "Adelphia has not entered into a precedent agreement with any shippers who would serve the Calpine Power Plant." Rehearing Order, P 125, JA898–99. Indeed, nothing indicates that Calpine will even use Zone South gas as an "alternative" to its current procurements—or, if it will, to what extent. *See id*.; Certificate Order, P 249, JA599–600. Thus, the Commission reasonably concluded that "[w]ithout a precedent agreement stating the amount of capacity that would serve a power plant, we cannot reasonably quantify or foresee the [greenhouse gas emission] impacts." Rehearing Order, P 125, JA898–99; *see also* Environmental Assessment at 132 n.39, JA132 ("The Parkway Lateral … *may* serve Calpine Corporation's power plants[.]" (emphasis added)). NEPA does not demand forecasting "'that is not meaningfully possible,'" especially when the agency, as here, asked for additional information. *Birckhead*, 925 F.3d at 520 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)); *see also Sierra Club*, 867 F.3d at

199 (an agency is "not required to foresee the unforeseeable" (internal quotations omitted)).

4. Delaware Riverkeeper rejoins that if the Commission had just asked more questions, then it might have been able to better quantify downstream emissions. Br. 30–31. According to Delaware Riverkeeper, it was not enough that the Commission sought end-use information from Adelphia; FERC should have demanded that the shipper weigh in, too. Br. 30–31.

Delaware Riverkeeper waived this argument by failing to raise it in its rehearing application. *See* 15 U.S.C. § 717r(a) (rehearing application must "set forth specifically the ground or grounds upon which such application is based"); *id*. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing …."); *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) ("To bring a particular claim in a petition for review, a petitioner needs to have alerted the Commission to the specific legal argument[] presented on rehearing (absent a reasonable ground for not doing so)." (internal quotations omitted)). The closest it came was to

assert that "FERC should have asked for more specifics it [sic] ***if*** the information was too general." Delaware Riverkeeper Rehearing Request, FERC Dkt. CP18-46, at 108 (filed Jan. 21, 2020), R.937, JA778 (emphasis added). That oblique conditional fails to satisfy the Natural Gas Act's "punctilious[]" rehearing requirement. *Nw. Pipeline Corp. v. FERC*, 863 F.2d 73, 78 (D.C. Cir. 1988) (internal quotations omitted). What's more, Delaware Riverkeeper quickly answered its own conditional in the negative, insisting that the available data on end uses was *not* "too 'generalized,'" and that "FERC absolutely had enough information on more end-uses of the gas to make 'reasonable forecast[s][.]'" Delaware Riverkeeper Rehearing Request at 108, 110, JA778, 780 (quoting Certificate Order, P 249, JA599–600; *Sabal Trail*, 867 F.3d at 1374).

In any event, by its terms, *Birckhead* only requires FERC to direct end-use inquiries to the FERC-jurisdictional pipeline applicant. *See Birckhead*, 925 F.3d at 520 (criticizing the Commission for making "no effort to obtain the missing [destination and end-use] information *from Tennessee Gas*"—i.e., the pipeline applicant (emphasis added)). It declined to prescribe further steps, such as demanding additional

information from shippers. *See id*. And for good reason. As the Commission represented there, "[FERC] lack[s] … jurisdiction over shippers, distributors, and end users." *Id*. *Cf. City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013) (an agency's interpretation of the scope of its jurisdiction is entitled to *Chevron* deference).

5. Finally, the Commission considered a fourth precedent agreement, which committed 22,500 dekatherms/day for delivery to the Kimberly-Clark power plant. *See* Certificate Order, P 249, JA599–600; Rehearing Order, P 125 n.396, JA899. Because the record specified both the destination and quantity of gas to be consumed at the facility, the Commission found that estimating emissions from combusting that gas was reasonably foreseeable. *See* Certificate Order, PP 249, 255, JA599–600, 602 (calculating a projected 0.44 million metric tons per year of resulting downstream CO_2 emissions). Delaware Riverkeeper does not challenge that finding.

D. The Commission quantified Project-related greenhouse gas emissions to the extent it could reliably do so

The Commission acknowledged the direct and indirect greenhouse gas emissions caused by the Adelphia Project. As for direct impacts, the

Environmental Assessment found that Project construction would cause emissions of up to 0.012 million metric tons of CO_2e (carbon dioxide equivalent), and operation-related emissions of up to 0.081 million metric tons of CO_2e per year. Certificate Order, P 254, JA602 (citing Environmental Assessment at 125, 128, JA207, 210). As for indirect effects, *supra* at pp.40–47, the Commission estimated that delivery to the Kimberly-Clark power plant would result in 0.44 million metric tons per year of downstream CO_2 emissions. *Id*. P 255, JA602.

The Commission did not, however, measure these emissions' incremental contribution to global climate change because it lacked a reliable means of doing so. *Id*. P 257, JA603. As the Commission explained, "there is no scientifically-accepted methodology available to correlate specific amounts of [greenhouse gas] emissions to discrete changes in average temperature rise, annual precipitation fluctuations, surface water temperature changes, or other physical effects on the global environment or the Northeast region." Environmental Assessment at 172, JA254.

Delaware Riverkeeper counters that the Commission should have measured the climate change impact of the quantified direct and

indirect greenhouse gas emissions using either the Social Cost of Carbon tool or an Ecosystem Services Analysis, but neither contention has merit. *See* Br. 33–37. This Court has repeatedly upheld the Commission's rejection of the Social Cost of Carbon tool for this purpose. *See, e.g.*, *EarthReports*, 828 F.3d at 956; *Appalachian Voices v. FERC*, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished); *Sierra Club v. FERC*, 672 Fed. Appx. 38, 39 (D.C. Cir. 2016) (per curiam) (unpublished). As the Commission has (repeatedly) explained, "it would not be appropriate or informative to use [the tool]" because: (1) "the lack of consensus on the appropriate discount rate leads to significant variation in output"; (2) "the tool does not measure the actual incremental impacts of a project on the environment[]"; and (3) "there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes." *EarthReports*, 828 F.3d at 956 (quoting agency explanation; internal quotations omitted).

The Commission reasserted those reasons here, *see* Rehearing Order P 95 & n.296, JA884–86 (collecting cases), and Delaware Riverkeeper's "opening brief … fails to address several of the reasons

FERC gave for rejecting the Social Cost of Carbon tool," *Appalachian Voices*, 2019 WL 847199, at *2. Any argument that application of the tool is compelled here is, therefore, forfeited. *Id*. (quoting *Fox*, 794 F.3d at 29); *see also Missouri River*, 918 F.3d at 960.

Delaware Riverkeeper's contention that, in the alternative, FERC should have conducted an Ecosystem Services Analysis is even weaker. *See* Br. 35–36. Delaware Riverkeeper barely glances at the issue in its opening brief, asserting vaguely that "[e]cosystem services … can be calculated according to scientifically-based frameworks." Br. 35. That falls well short of "fully develop[ed]" "argument," meaning this assertion, too, is forfeited. *See Missouri River*, 918 F.3d at 960; *Fox*, 794 F.3d at 29.

In any event, the Commission responded to Delaware Riverkeeper's argument, made in its rehearing application, that an Ecosystem Services Analysis would appropriately "apply[] per-acre ecosystem service productivity estimates (denominated in dollars per acre per year) to various ecosystem service types." Delaware Riverkeeper Rehearing Request at 129, JA799. The Commission explained that "[it] has consistently found monetizing environmental

impacts to be inappropriate for project-level decision-making," and so an Ecosystem Services Analysis "is similarly inappropriate" to "meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects." Rehearing Order, P 91, JA882–83. That explanation is entitled to judicial respect, as NEPA does not require "monetary cost-benefit analysis." *See Minisink*, 762 F.3d at 112 (internal quotations omitted); *see also* 40 C.F.R. § 1502.23 (requiring only that "[a]gencies shall make use of reliable existing data and sources").

In sum, Delaware Riverkeeper—like petitioners in similar cases—"provide[s] no reason to doubt the reasonableness of the Commission's conclusion." *EarthReports*, 828 F.3d at 956; *Appalachian Voices*, 2019 WL 847199, at *2 (substantially the same).

E. The Commission's determination that it lacked a reliable method for calculating climate-related impacts caused by Project-related greenhouse gas emissions did not preclude granting Adelphia's application

Delaware Riverkeeper contends that, if the Commission correctly found that it cannot reliably measure the climate change-related

impacts of the Project's greenhouse gas emissions, then "the Project's application must be denied." Br. 33.

Not so. In fact, this Court has expressly affirmed the Commission's approval of natural gas infrastructure applications under substantially similar conditions. *See EarthReports*, 828 F.3d at 956 (evaluating sufficiency of FERC's environmental assessment); *see also Appalachian Voices*, 2019 WL 847199, at *2 (evaluating sufficiency of FERC's environmental impact statement). In *EarthReports*, the Court upheld the Commission's approval of a liquefied natural gas facility expansion and conversion project. 828 F.3d at 952–53. As here, the Commission issued an environmental assessment, paired with a finding of no significant impact. *Id*. at 953–54. Also as here, the Commission determined that it lacked a sound metric for measuring the significance of "environmental impacts of greenhouse gas emissions" from the project. *Id*. at 956 (upholding the Commission's declination to employ the Social Cost of Carbon tool). Notwithstanding that the project's climate change-related impacts went unmeasured, the Court found "no reason to doubt the reasonableness of the Commission's conclusion," and upheld its finding of no significant impact. *Id*. at 952, 956.

That outcome conforms to the scope of the Court's review of environmental assessments generally, which is limited to "'ensur[ing] that no arguably significant consequences have been *ignored*.'" *Myersville*, 783 F.3d at 1322 (emphasis added; internal quotations omitted) (quoting *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006)). By explaining *why* it lacked a reliable means of tying greenhouse gas emissions to climate change-related impacts, the Commission confronted the relationship between the two head-on, thus satisfying its NEPA obligations. *See EarthReports*, 828 F.3d at 956.

The same conclusion applies with even greater force here. In assessing the Adelphia Project, the Commission *did* measure the significance of Project-related greenhouse gas emissions. It quantified those emissions that were reasonably foreseeable, "placing those emissions numbers in the context of cumulative emissions from other sources, and discussing the overall impact of these cumulative emissions." Rehearing Order, PP 33, 90, 94, JA855–56, 881–82, 884.

Specifically, the Commission forecasted that burning 22,500 dekatherms/day of gas at the Kimberly-Clark power plant would result in 0.44 million metric tons per year of CO_2 emissions. Certificate Order,

P 255, JA602. (As discussed, direct emissions were much smaller, amounting to construction-related emissions of 0.012 million metric tons CO_2e, and annual operation-related emissions of 0.081 million metric tons CO_2e. *Id*. P 254, JA602.) Placed in context, the Project's downstream emissions represent a 0.20% increase in CO_2 emissions in Pennsylvania and a 0.01% increase nationally. *Id*. P 255, JA602. "To provide additional context," the Commission compared the 0.44 million tons of indirect emissions to 2017 total domestic emissions, which amounted to 5,742.6 million metric tons of CO_2e. *Id*.

That satisfies the Commission's NEPA obligations. Indeed, "'estimat[ing] [the] level of [greenhouse-gas] emissions can serve as a reasonable proxy for assessing potential climate change impacts.'" *Sabal Trail*, 867 F.3d at 1374 (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013)). Thus, far from "ignor[ing]" the issue, *see Myersville*, 783 F.3d at 1322, the Commission expressly addressed the significance of Project-related greenhouse gas emissions: it quantified emissions where it could, asked Adelphia for more information where it could not, and explained why it could not reliably extrapolate climate change-related impacts from the Project's

quantifiable greenhouse gas emissions. *See* Rehearing Order, PP 90, 95 & n.296, 125, JA881–82, 884–86, 898–99; Certificate Order, PP 255, 263, JA602, 606. The Commission was not required to do more. *Cf. Del. Riverkeeper*, 753 F.3d at 1310 ("[NEPA] does not demand forecasting that is not meaningfully possible" (internal quotations omitted)); *see also EarthReports*, 828 F.3d at 956.

F. The Commission did not unlawfully "segment" review of the Project

NEPA requires FERC to "include 'connected actions,' 'cumulative actions,' and 'similar actions' in a project [Environmental Assessment]." *Del. Riverkeeper*, 753 F.3d at 1308 (quoting 40 C.F.R. § 1508.25(a)). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions" and reviews their environmental impacts independent of each other. *See id*. at 1313. Delaware Riverkeeper argues that the Commission unlawfully "segmented" its environmental review of the Adelphia Project by failing to consider it together with the PennEast natural gas pipeline project, also located in Pennsylvania.[2] Br. 45–47.

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[2] The Commission's review of PennEast's application is the subject of judicial review in *Delaware Riverkeeper Network v. FERC*, D.C. Cir.

Delaware Riverkeeper is incorrect. The dispositive question is whether the two projects "are unrelated," such that "neither depends on the other for its justification." *See Myersville*, 783 F.3d at 1326 (citing 40 C.F.R. § 1508.25(a)(1)(iii)). As relevant here, "[c]onnected actions …[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). The Court asks "'whether one project will serve a significant purpose even if a second related project is not built.'" *City of Boston Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018) (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987)).

Thus, in *City of Boston*, the Commission was not required to merge its environmental reviews of three projects, even though they were all sponsored by the same natural gas company. *See id*. The three projects "held separate open seasons, executed individual precedent agreements with largely distinct shippers, and ha[d] different negotiated and

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No. 18-1128. While briefing in that appeal is complete, the Court has placed it in abeyance pending final resolution of a related matter in the United States Supreme Court. *See In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019)*, cert. granted sub nom. PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039 (U.S. Feb. 3, 2021).

recourse rates and separate in-service dates." *Id*. (quoting agency explanation). The Court held that, "[i]n those circumstances, the Commission reasonably concluded that the projects" lacked the interdependence necessary to support a claim of unlawful segmentation. *Id*. (quoting agency explanation); *see also Myersville*, 783 F.3d at 1326–27 (finding that two projects had independent utility).

The case for unlawful segmentation here is substantially weaker than in *City of Boston*. All the indicia of independent utility that inhered there apply equally here. But the Adelphia and PennEast Projects also have diversity of ownership. *See In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 99 (3d Cir. 2019) (explaining that the project sponsor there was the PennEast Pipeline Company).

And the record contains more evidence of independent utility. As the Commission explained, existing natural gas pipelines "in the project area, including the authorized PennEast Project," are "fully subscribed." Certificate Order, P 40, JA514. Thus, they "cannot provide additional capacity to the area that Adelphia is proposing to serve." *Id*. That immediately distinguishes this case from another appeal where the Court found unlawful segmentation. In *Delaware Riverkeeper*, the

Commission separately assessed four pipeline segments that, together, comprised a unitary pipeline upgrade. 753 F.3d at 1317. The Court rejected that approach because the project on review "[was] inextricably intertwined with the other three improvement projects that, together, upgrade the entire Eastern Leg of the 300 Line." *Id*. No such interdependence presents in the Adelphia Project in relation to the PennEast Project.

Delaware Riverkeeper's ancillary arguments do not help its case. It reasons that a proposed interconnection between the PennEast and Adelphia Projects betrays a common geography, and thus belies the lawfulness of independent reviews. Br. 46. But the two projects are not unlawfully segmented just because one connects to another. *See Del. Riverkeeper*, 753 F.3d at 1317. Thus, in *Delaware Riverkeeper*, the Court explained that independent review of a highway interchange does not amount to unlawful segmentation *so long as* the interchange "has utility independent of another highway to which it connects." *Id*.

Nor does that geographical overlap trigger a cumulative impacts analysis under NEPA. *See id*. at 1308; 40 C.F.R. § 1508.25(a). The proposed PennEast interconnection—the "Church Road Interconnect"—

is located in Bethlehem Township, Northampton County, Pennsylvania. *See* FERC, "PennEast 2020 Amendment Project: Environmental Assessment," FERC Dkt. No. CP20-47, at 1–2 (Aug. 3, 2020); Figure A.1-1 (below). Only the Adelphia Project's northern span crosses Northampton County—i.e., the section that includes only existing pipeline. *See* Figure 1, *supra* at p.8 (showing only existing pipeline in Northampton County); *see also* Rehearing Order, PP 130, 133, JA901–03; Certificate Order, P 232, JA591; Environmental Assessment at 157, JA239. It does not form part of the 4.7 miles of *new* pipeline or compressor station construction located in Zone South. *See* Certificate Order, PP 6–7, JA500–02. Thus, the Commission reasonably found that the "PennEast project is entirely outside of the geographic scope of the cumulative impact assessment where construction is proposed." Certificate Order, P 232, JA591; *see also Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (identifying the pertinent geographic area for purposes of conducting a cumulative impacts analysis "is a task assigned to the special competency of the appropriate agencies").

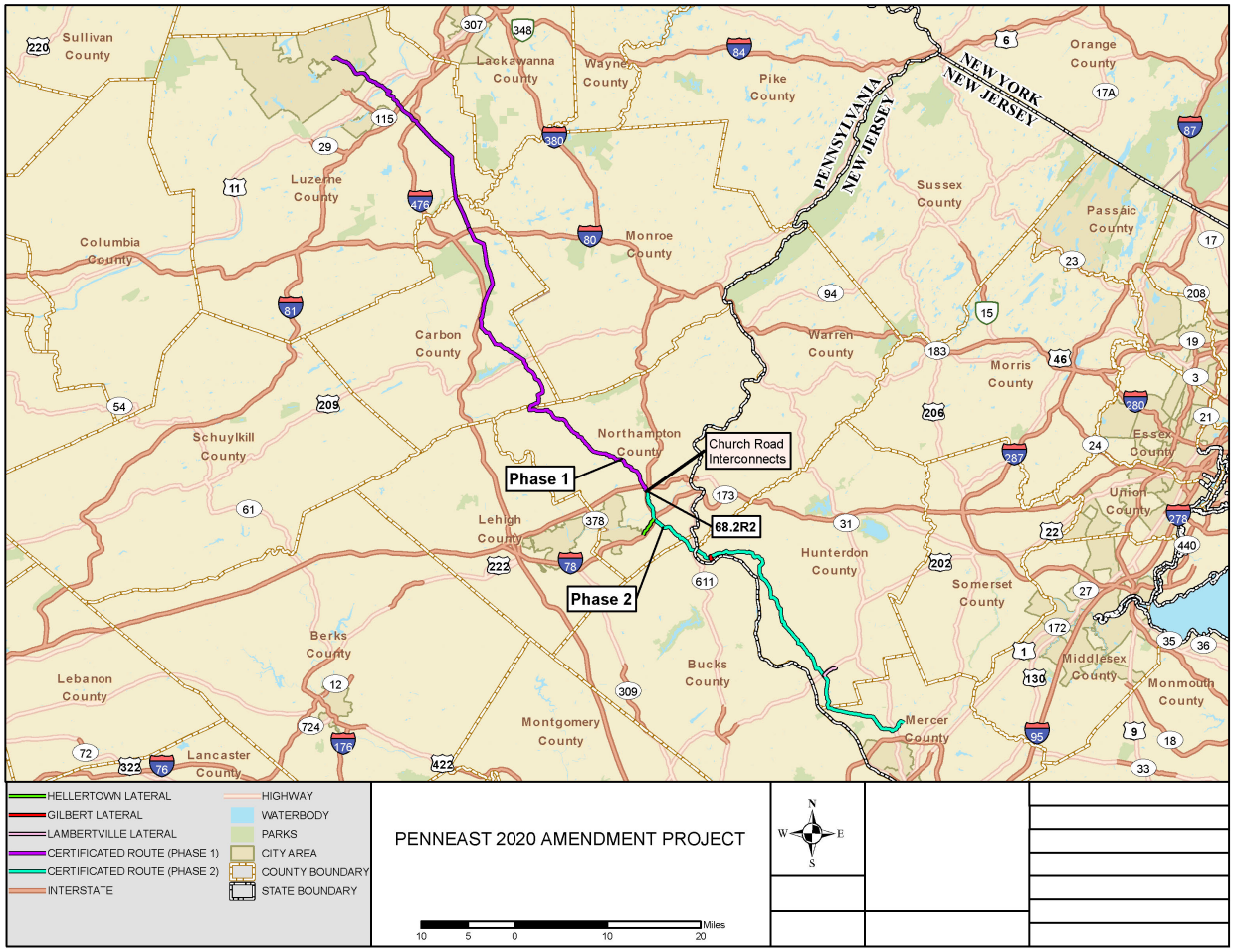

Figure A.1-1 Location and Overview of Proposed Facilities

Source: PennEast 2020 Amendment Project: Environmental Assessment at 2.

That leaves Delaware Riverkeeper with the residual theory that by transporting natural gas rather than oil, the Zone North A system could experience new methane (natural gas) leaks. Br. 47. And this new environmental impact, it reasons, triggers a mandatory cumulative impacts analysis with the PennEast Project. *Id*.

But the record evidence is to the contrary. Delaware Riverkeeper presumes that, before Adelphia's purchase of the Interstate Energy system, the pipeline was transporting oil. Yet while it was *equipped* to handle oil before, it did not, at least not since 2014. *See* Certificate Order, P 4 n.7, JA499 ("[S]ince 2014, the northern segment has transported only natural gas and the southern segment has been inactive."). And the record reflects that the same volumes of natural gas will continue to flow through the Project's northern section—belying any suggestion of *new* and *different* environmental impacts. *See* Br. 47. Indeed, Adelphia's precedent agreements, signed with existing shippers, will "continue" the prior service provided by Interstate Energy. Certificate Order P 5, JA500. And those contracts for Zone North A and Zone North B reflect the same amount of daily gas transportation as before the transfer in ownership. *See id*. P 249, JA599–600 (explaining that the agreements "replicate [natural gas] service currently being provided, and therefore, will not alter the downstream usage of the gas being provided").

In any event, the Commission found no significant impact from potential natural gas releases anywhere on the Project. It explained

that any such releases "would generally dissipate rapidly through the air ..., thereby causing *no impact* on groundwater"—a conclusion uncontested by Delaware Riverkeeper. *Id*. P 146, JA557 (emphasis added); *see also id*. P 156, JA560 (same). The Commission is not required to consider impacts caused by a *different* project (PennEast) in its analysis of a pipeline that will, itself, have no "incremental impact" on the environment. *See* 40 C.F.R. § 1508.7 (where a federal action has an "incremental impact," that impact must be considered cumulatively with "other past, present, and reasonably foreseeable future actions"); *see also* Rehearing Order, P 133, JA903 (explaining that the portion of the Adelphia Project in the vicinity of the PennEast Project "will not contribute to any of the environmental impacts identified by Delaware Riverkeeper"); Environmental Assessment at 28–29, JA110–11 (finding the Adelphia Project as a whole will have "no significant [environmental] impact").

G. The Commission took a "hard look" at the environmental impacts from the Quakertown Site

The Commission took the requisite "hard look" at the environmental impacts of choosing the Quakertown Site for a new compressor station. *See Balt. Gas*, 462 U.S. at 97. As part of its

analysis, the Commission explained in detail why it rejected alternative locations, thereby satisfying its NEPA obligation to include a "'brief discussion[]' of reasonable alternatives to the proposed action." *See Myersville*, 783 F.3d at 1323 (quoting 40 C.F.R. § 1508.9(b)).

West Rockhill Township argues that the Commission wrongly rejected the Salford Site as the preferred alternative, and the McCarthys argue that the Commission failed to mitigate impacts from the Quakertown compressor station. *See generally* Br. 53–70. Most of the parties' objections are waived for failure to identify them in a rehearing application, or forfeited for lack of specific argument on appeal. *See Missouri River*, 918 F.3d at 960; *Fox*, 794 F.3d at 29; *Ameren*, 893 F.3d at 793; 15 U.S.C. § 717r(a)–(b).

1. The Court lacks jurisdiction over the McCarthys' particular objections to the extent the Commission rejected them for failure to comply with pleading requirements

As an initial matter, the Court lacks jurisdiction to consider those arguments advanced by the McCarthys that the Commission did not consider in the Rehearing Order. The Commission dismissed the McCarthys' rehearing application because it failed to comply with the Commission's "Rules of Practice and Procedure." Rehearing Order, P 7,

Ordering P (B), JA844–45, 904. Those rules require any such application to "'include a separate section entitled "Statement of Issues," which lists each issue in a separately enumerated paragraph,'" and also includes "representative Commission and court precedent" relied-upon. *Id*.; 18 C.F.R. § 385.713(c)(2)). "[A]ny issue not so listed will be deemed waived." 18 C.F.R. § 385.713(c)(2); Rehearing Order, P 7, JA844–45. The McCarthys' rehearing application included no Statement of Issues, meaning they waived their objections to the Certificate Order. *Id*.

The Commission addressed some of the McCarthys' objections anyway because the McCarthys "raise[d] several of the same issues raised by Delaware Riverkeeper and West Rockhill Township" in their own rehearing applications. Rehearing Order, P 7, JA844–45. However, the Court lacks jurisdiction to consider those objections the McCarthys alone made, and which the Commission did not resolve in the Rehearing Order, because there exists no final order "upon" those objections.

The text of the Natural Gas Act and this Court's precedent explain why. As this Court observed in *Keating v. FERC*, section 717r(b) of the

Natural Gas Act[3] "provides for judicial review of 'orders of a definitive character dealing with the merits of a proceeding before the Commission[.]'" 569 F.3d 427, 432 (D.C. Cir. 2009) (quoting *FPC v. Metro. Edison Co.*, 304 U.S. 375, 384 (1938)). Thus, in *Keating*, it mattered not that the Commission dismissed a rehearing application as deficient, because the Commission addressed the objections lodged in the rehearing application on the merits anyway. *Id*.

The same result does not pertain, however, where the Commission dismisses a deficient rehearing application and does *not* address all the objections made in that application in a subsequent rehearing order. This Court has explained that, under 15 U.S.C. § 717r(b), jurisdiction attaches to "'the order of the Commission upon *the application for rehearing*.'" *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985) (quoting 15 U.S.C. § 717r(b)). Congress' use of the determiner "the," rather than the indefinite article "an," before "application for rehearing,"

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[3] *Keating* involved the Federal Power Act, not the Natural Gas Act. However, it is well-established that "the relevant provisions of the [Federal Power Act and Natural Gas Act] are analogous," meaning "[t]his Court has routinely relied on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa." *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016).

"makes it plain that what is referred to is … the application *of the party who seeks judicial review*." *Id*. So, in *ASARCO*, the Court lacked jurisdiction to consider an objection raised in another party's rehearing application, because the petitioner failed to raise the issue in its *own* application. *Id*. at 773–74, 775.

The immediately preceding statutory provision provides in relevant part:

> *The* application for rehearing shall *set forth specifically* the ground or grounds upon which such application is based. Upon *such* application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission *acts upon* the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.

15 U.S.C. § 717r(a) (emphasis added). Thus, to be actionable, a party's application must include the requisite "specific[ity]." *Id*.; *see also Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (a rehearing application must raise any objections "with specificity" (internal quotations omitted)). The Commission's implementing regulations explain that a "specific[]" application must include, among other things, a "Statement of Issues." 18 C.F.R. § 385.713(c)(2); Rehearing Order, P 7, JA844–45. Only "[u]pon *such* application"—i.e.,

one that satisfies these statutory and regulatory requirements—does the Commission "have the power" to issue a rehearing order. 15 U.S.C. § 717r(a) (emphasis added). And the statutory provision's next sentence explains that the Commission may "act[] upon" the rehearing application within thirty days by issuing a rehearing order. *See id*.

Putting it all together, the Commission "acts upon"—by issuing a rehearing order—those applications that comply with the specificity requirements set forth in 15 U.S.C. § 717r(a) and 18 C.F.R. § 385.713(c) for submitting an application for rehearing. As follows, there can be no final "order of the Commission *upon* the application for rehearing," *id*. § 717r(b) (emphasis added)—which is necessary for the Court to assert jurisdiction over a petition for judicial review, *id*.—absent a compliant application. And because, under *ASARCO*, the Court's jurisdiction to consider a party's claims is tied to the sufficiency of *that* party's rehearing application, *see* 777 F.2d at 773, a final order does not exist as to a particular party if the Commission dismissed *its* application as deficient.

That makes sense. "As the saying goes, 'rules is rules.'" *Granholm ex rel. Mich. Dep't of Nat. Res. v. FERC*, 180 F.3d 278, 282 (D.C. Cir.

1999) (quoting Bartlett J. Whiting, *Modern Proverbs and Proverbial Sayings* 541 (1989)). Were it otherwise, a prospective petitioner could file a deficient rehearing application before the Commission, yet press its arguments on judicial review anyway. The Natural Gas Act's "specific[ity]" requirements would be relegated to advisory status, working a prejudice to the Commission, to the other parties, and to the integrity of the rehearing process itself.

Accordingly, to the extent the Commission did not address the McCarthys' objections—lodged in their deficient, rejected rehearing application—on the merits in its Rehearing Order, the Court lacks jurisdiction to consider them on appeal.[4]

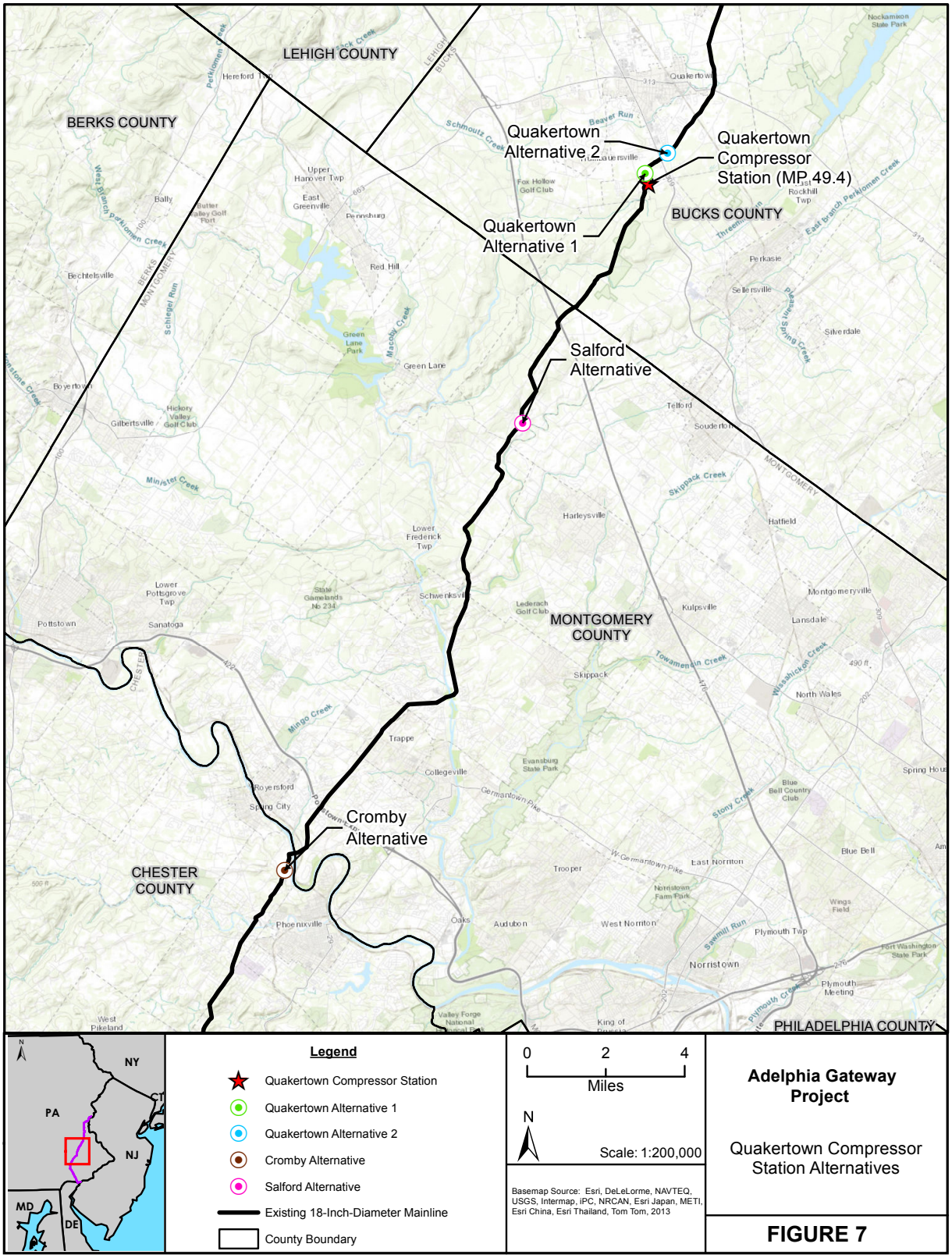
2. The Commission adequately considered alternatives to the Quakertown Site and addressed potential adverse impacts

Those arguments that *are* arguably preserved and adequately pressed on appeal fall into four categories: allegations that (1) the Salford Site is preferable because it is located on a larger land mass

[4] The McCarthys were not without recourse. They were on notice that the Commission dismissed their rehearing application. *See* Rehearing Order, Ordering P (B), JA904. They could have appealed the Commission's dismissal of their application, yet did not do so.

away from residences; (2) FERC ignored safety issues with the Quakertown Site; (3) FERC should have required an analysis of using electricity to power the Quakertown compressor station rather than natural gas; (4) FERC failed to adequately address noise pollution from the proposed compressor station; and (5) FERC did not adequately address the compressor station's impacts on wetlands. (Locations of the Quakertown and Salford Sites are depicted in the map below.)

None of these claims have merit because the Commission did, in fact, take the requisite "hard look" at all these issues. *See Minisink*, 762 F.3d at 111–12.



Source: Environmental Assessment at 185, JA267.

a. Relative sizes of the Quakertown and Salford Sites. The Quakertown compressor station will occupy 1.2 acres of land. Certificate Order, P 127, JA549. Petitioners diverge on whether the plot size is inconsistent with government guidance documents (Township's argument, Br. 53), or outright violates a FERC "requirement" (McCarthys' argument, Br. 56). In any event, the Township argues that the Commission should have chosen a site of 10-to-40 acres. Br. 53.

The Commission "clearly addressed this issue." *See Minisink*, 762 F.3d at 112. It explained that, while FERC's landowner pamphlet offers a typical land-size range for locating a compressor station—10-to-40 acres[5]—this is not a binding requirement. Certificate Order, P 127, JA549. The same is true for the Federal Emergency Management Agency and U.S. Department of Transportation—Pipeline and Hazardous Materials Safety Administration guidance document, cited by the Township, which merely observes that compressor stations "generally occupy from 15 to 40 acres of land." *See* West Rockhill

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[5] *See* FERC, "An Interstate Natural Gas Facility on My Land? What Do I Need to Know?" at 9 (Aug. 2015) (explaining that "[u]sually the natural gas company purchases ten to forty acres for a compressor station"), https://www.ferc.gov/resources/guides/gas/gas.pdf.

Township Rehearing Request, FERC Dkt. No. CP18-46, at Att. 2 p.21 (filed Jan. 21, 2020), R.939, JA832.

Taking a different approach, the Township argues that the Commission relied on false information. It claims the Salford Site is, in fact, 41 acres, not the Environmental Assessment's reported 2.3 acres. Br. 49 (citing Environmental Assessment at 184, JA266). But the Environmental Assessment states only that the construction area *at* the Site is 2.3 acres—which the Township does not dispute. *See* Environmental Assessment at 184, Table C-2, JA266. It did not purport to identify the *lot's* total size. *Id*. In any event, the Rehearing Order acknowledged the controversy (noting that Adelphia identified the Salford Site as only 2.3 acres), and found that the determinative factor disqualifying the Salford alternative was that "it would result in increased air emissions." Rehearing Order, P 50, JA862–63.

For their part, the McCarthys make the conclusory assertion that the Salford Site is "a better location," and vaguely reference "a detailed site analysis," presumably located somewhere in the record. Br. 63 (citing no authority). Besides the Court's lack of jurisdiction to consider the McCarthys' assertions not addressed by the Commission, *see supra*

at pp.63–68, this particular argument is also undeveloped and thus forfeited. *See Missouri River*, 918 F.3d at 960; *Fox*, 794 F.3d at 29.

It also fails on the merits. Combing through the McCarthys' rehearing application reveals the analysis to which they might be referring. And that analysis is incorrect. Contrary to their contention on rehearing, the Environmental Assessment did not state that the Salford Site would be closer to residences than the Quakertown Site. *See* McCarthys Rehearing Request, FERC Dkt. CP18-46, at 4–5 (filed Jan. 16, 2020), R.936, JA668–69. Instead, the Commission explained that the "*potential* alternative locations"—i.e., not those locations, like Salford, actually chosen as alternatives for further study—were closer to residences than the Quakertown Site, and so they "were not evaluated further." Environmental Assessment at 183–84, JA265–66 (emphasis added) (recognizing that the "Salford Alternative[] would be sited *further from the closest residence* than" the Quakertown Site (emphasis added)).

The Township also alleges that "FERC failed to acknowledge the much larger isolation distance and other beneficial characteristics of the

Salford Site." Br. 37. But that, too, is wrong. The Commission assessed four alternatives to the Quakertown Site, and measured the distance from the nearest residence or other occupied structure for each. Environmental Assessment at 184, Table C-2, JA266. The Township fails to identify what other distances FERC should have studied.

Further, any argument around the Township's vague reference to "other beneficial characteristics" of the Salford Site is forfeited. *See Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) ("argument forfeited where party made only 'oblique' and 'conclusory' statements in its opening brief" (quoting *CTS Corp*., 759 F.3d at 61)). It also fails. The Commission reasonably found that the Salford Site did "not provide a significant environmental advantage over" the Quakertown Site. *See* Environmental Assessment at 184, JA266. It explained that even if Salford were chosen, a new meter station would be required at the existing Quakertown facility. *Id*. And the Salford Site would also need additional compression, resulting in increased air emissions. *Id*.; Rehearing Order, P 50, JA862–63.

Finally, on the main issue of concern for the McCarthys (distance from their property, *see* Br. 56), the Environmental Assessment found

that the Salford Site lacks a clear distance advantage: it is located only 159 feet from an occupied business—much closer than the Quakertown Site is to the McCarthys' home (425 feet away).[6] *See* Environmental Assessment at 184 & Table C-2, JA266.

In short, the Commission satisfied its NEPA obligation to include a "'brief discussion[]'" of reasonable alternatives. *See Myersville*, 783 F.3d at 1323 (quoting 40 C.F.R. § 1508.9(b)); *see also Birckhead*, 925 F.3d at 515 (FERC satisfied NEPA by finding that the alternative site for a compressor station "d[id] not have a significant advantage over the proposed site," after conducting an "overall assessment of [] various factors" (quoting agency explanation)). And in light of the "highly technical" nature of evaluating the relative merits and demerits of compressor stations, the Commission's ultimate decision deserves a high degree of deference. *See Birckhead*, 925 F.3d at 516 (quoting *Del. Riverkeeper*, 753 F.3d at 1313).

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[6] The Township asserts that the Commission used a different method for measuring the distance from the Salford Site to other structures than it did "at all other sites." Br. 51. The Township did not include this allegation in its rehearing application; it is waived. *Ameren*, 893 F.3d at 793; 15 U.S.C. § 717r(a)–(b).

b. Alleged safety issues with the Quakertown Site. The Township also argues that the Commission failed to adequately address alleged safety issues with the proposed Quakertown compressor station. Br. 39–40. Its only specific contention, however, is that FERC did not discuss reliance on local emergency response personnel with the municipality. *See* Br. 40. And for that assertion, it cites no authority for any purported consultation requirement, meaning any such argument is forfeited. *See Banner Fund*, 211 F.3d at 613; *see also CTS Corp.*, 759 F.3d at 60.

In any event, the Certificate Order requires Adelphia to implement numerous safety-related mitigation measures, consistent with Department of Transportation—Pipeline and Hazardous Materials Safety Administration standards. *See* Certificate Order, PP 219–21, JA585–87. Those standards include working with "state agency partners and others at the federal, state, and local levels." *Id*. P 219, JA585–86. They also specify minimum requirements pertaining to material selection and qualification, design specifications, and protection from internal, external, and atmospheric corrosion. Environmental Assessment at 145, JA227. Particularly relevant here,

Adelphia must equip the Quakertown compressor station with automated control systems to ensure station and pipeline pressures are maintained within safe limits. *Id*. The Commission reasonably relied on these standards issued by the expert agency in determining that the compressor station would not present significant safety concerns. *Cf. City of Boston*, 897 F.3d at 254 (Commission entitled to rely on expert recommendations in issuing safety findings).

c. Electric versus natural gas compression. The McCarthys contend that the Commission should have required an analysis of electric-powered compression rather than the proposed and approved natural gas-powered option for the Quakertown compressor station. Br. 64–65. But the Commission *did* study the issue, and concluded that the natural gas-driven option was preferable because it would impact less acreage (due to necessary construction of a 0.7-mile feeder line for an electric-driven facility), and would provide more reliable service. Certificate Order, PP 114, 120, JA543, 545. Accordingly, the Commission "clearly addressed this issue." *See Minisink*, 762 F.3d at 112.

d. Noise pollution. The McCarthys also argue that Adelphia's sound study of the Quakertown compressor station is inadequate

because it is based on pre-construction estimates. Br. 68. And they question the study's methodology, asserting that the Commission failed to explain how compressor noise was simulated, or how the noise would be controlled. *Id*.

The McCarthys' contention that the sound study cannot be based on pre-construction estimates is unavailing. Of course any pre-construction study will involve some future projections, but that does not bar Commission approval. *See Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) ("agencies may not be precluded from proceeding with particular projects merely because the environmental effects of that project remain to some extent speculative"); *vacated in part on other grounds sub nom*., *W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). And the Certificate Order includes several post-operation requirements. Adelphia must ensure compliance with local noise ordinances, and complete a noise survey within 60 days of commencing operations. Certificate Order, P 213, JA583–84. If noise exceeds a baseline level of 55 dBA—established by the Environmental Protection Agency as "protecting the public from indoor and outdoor activity interference"—then Adelphia must install additional noise controls within one year of

the in-service date. Rehearing Order, PP 105–06, JA889–90. Further, while the Commission declined to adopt specific noise study measures requested by the McCarthys, it did require Adelphia to operate the compressor station at "maximum possible power load" in its noise study. *Id*. P 107, JA890–91. The Commission reasonably found this would "ensure that the Quakertown compressor station's greatest capacity for noise will be surveyed." *Id*.

In sum, by considering the potential for noise pollution, placing that concern in the context of accepted federal standards, requiring compliance with all local laws, and imposing ameliorative measures in the case of non-compliance, the Commission "clearly addressed the issue" of noise pollution. *See Minisink*, 762 F.3d at 112.

e. Impacts to wetlands. The Township faults the Commission for not showing how historic homes, as well as "prime farmlands and wetlands directly underneath the proposed Quakertown construction site," would not be adversely impacted. Br. 41. No party raised objections related to "historic homes" or "prime farmlands" in their rehearing applications; they are waived. *See Ameren*, 893 F.3d at 793; 15 U.S.C. § 717r(a)–(b).

Regarding impacts to wetlands (an issue raised by Delaware Riverkeeper in *its* rehearing application), the Commission *did* study potential impacts, and found that temporary construction would affect 0.8 acre of nearby wetlands, with operational impacts to 0.1 acre of that total. Environmental Assessment at 65, JA147. The Commission also explained that 0.01 acre of "exceptional value" wetland—due to the presence of the bog turtle—would be permanently lost. *Id*. The Commission found these impacts acceptable because the Quakertown compressor station would be located at an already-developed above-ground facility along the existing mainline, and because Adelphia committed to implementing mitigation measures—namely, installing timber mats and geotextile fabric in the wetlands during construction. *Id*.

f. Petitioners' remaining arguments are waived. Waived for failure-to-specifically-address in a rehearing application, *see supra* at p.63, are arguments that: (1) FERC did not explain why the "proposed Marcus Hook compressor station" would be "larger than the proposed Quakertown site" (Br. 39); (2) the Quakertown compressor station "threatens to violate federal, state and local environmental laws"

(Br. 43); (3) the Quakertown compressor station violates a regulation specifying setback distances (Br. 49); and (4) the Environmental Assessment does not discuss the "likely size of the relevant blast zone" associated with a compressor station leak (Br. 50).

Also waived for the same reason are the McCarthys' particular arguments that: (1) they supplied FERC with evidence on air emissions "and other subjects" (Br. 59); (2) FERC erred in accepting Adelphia's air quality dispersion modeling (which shows no air quality violations), and that a study by Dr. Bryce Payne shows that methane plumes travel three miles from compressor stations (Br. 60–61); (3) FERC should have required a third-party-audited analysis comparing the Quakertown and Salford Sites (Br. 64); (4) FERC should have analyzed a selective catalytic reduction system against the proposed and approved catalytic oxidation system for the Quakertown compressor station (Br. 65–66); and (5) FERC lacked adequate compressor engine operating data (for purposes of measuring air emissions), and did not adequately assess how fugitive emissions would be detected and controlled at the Quakertown Site (Br. 66–67).

Finally, the Court also lacks jurisdiction to consider the McCarthys' argument that the Commission failed to consider its alternative method for measuring noise—namely, the "MD Boyle, et al" study. *See* Br. 69–70. Because only the McCarthys raised this objection in their (dismissed-as-deficient) rehearing application, no final order pertaining to this objection exists for purposes of judicial review. *See supra* at pp.63–68.

IV. The Commission's approval of the Project does not violate the Constitution of the United States

Finally, the Township asserts that the Commission violated the United States Constitution by preempting state and local actions it deems necessary to protect its residents. Br. 77–81.

The Township did not raise this argument on rehearing to the Commission; it is waived. *See Ameren*, 893 F.3d at 793; 15 U.S.C. § 717r(a)–(b). *Cf. Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015) (an agency's lack of power to "make definitive pronouncements" on constitutional claims does "not preclude requiring the challenge to go through the administrative route"). Nor does the Township substantiate its novel claim of a constitutional entitlement to "prevent FERC from authorizing the construction of natural gas infrastructure

within its Township." Br. 78. It cites no judicial decision for the proposition that a locality may veto FERC's issuance of pipeline certificates when doing so conflicts with its interest in "protect[ing] its citizens' health, safety and welfare." Br. 80.

In fact, the law is precisely the opposite. "The [Natural Gas Act] confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," which includes "authority over the rates and facilities of natural gas companies used in this transportation and sale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01 (1988). Under the Constitution's Supremacy Clause, FERC's congressionally-derived authority preempts contrary state and local policies, not the other way around. *See Oneok, Inc. v. Learjet, Inc.*, 557 U.S. 373, 376–77 (2015) (quoting U.S. Const., Art. VI, cl. 2).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

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March 30, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), as modified by the November 19, 2020 Order of this Court, because this brief contains 14,440 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in New Century Schoolbook LT Pro 14-point font using Microsoft Word 365.

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March 30, 2021

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1206, 20-1338, and 20-1339
(consolidated)

DELAWARE RIVERKEEPER NETWORK, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

ADDENDUM TO BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 30, 2021

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§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

The second paragraph of the revised section is new. It recognizes the necessity of final disposition of litigation in which appellate review has been had and further review by the Supreme Court is impossible for lack of a quorum of qualified justices.

[§ 2110. Repealed. Pub. L. 97–164, title I, § 136, Apr. 2, 1982, 96 Stat. 41]

Section, acts June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, § 109, 63 Stat. 105, provided that appeals to the Court of Claims in tort claims cases, as provided in section 1504 of this title, be taken within 90 days after the entry of the final judgment of the district court.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as an Effective Date of 1982 Amendment note under section 171 of this title.

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(Added May 24, 1949, ch. 139, § 110, 63 Stat. 105.)

HISTORICAL AND REVISION NOTES

1949 ACT

Incorporates in title 28, U.S.C., as section 2111 thereof, the harmless error provisions of section 269 of the Judicial Code (now repealed), which applied to all courts of the United States and to all cases therein and therefore was superseded only in part by the Federal Procedural Rules, which apply only to the United States district courts.

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pur-

suant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

(Added Pub. L. 85–791, § 2, Aug. 28, 1958, 72 Stat. 941; amended Pub. L. 89–773, § 5(a), (b), Nov. 6, 1966, 80 Stat. 1323; Pub. L. 100–236, § 1, Jan. 8, 1988, 101 Stat. 1731.)

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–236 substituted ''If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:'' and pars. (1) to (5) for ''If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.''

1966—Subsec. (a). Pub. L. 89–773, § 5(a), substituted ''The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing'' for ''The several courts of appeal shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing.'' See section 2072 of this title.

Subsec. (b). Pub. L. 89–773, § 5(b), substituted ''the rules prescribed under the authority of section 2072 of this title'' for ''the said rules of the court of appeals'' and for ''the rules of such court''.

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–236, § 3, Jan. 8, 1988, 101 Stat. 1732, provided that: ''The amendments made by this Act [amending this section and section 1369 of Title 33, Navigation and Navigable Waters] take effect 180 days after the date of the enactment of this Act [Jan 8, 1988], except that the judicial panel on multidistrict litigation may issue rules pursuant to subsection (a)(3) of section 2112 of title 28, United States Code (as added by section 1), on or after such date of enactment.''

SAVINGS PROVISION

Pub. L. 89–773, § 5(c), Nov. 6, 1966, 80 Stat. 1323, provided that: ''The amendments of section 2112 of title 28 of the United States Code made by this Act shall not operate to invalidate or repeal rules adopted under the authority of that section prior to the enactment of this Act [Nov. 6, 1966], which rules shall remain in effect until superseded by rules prescribed under the authority of section 2072 of title 28 of the United States Code as amended by this Act.''

§ 2113. Definition

For purposes of this chapter, the terms ''State court'', ''State courts'', and ''highest court of a State'' include the District of Columbia Court of Appeals.

EX. ORD. NO. 10752. DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:

SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,'' as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

SEC. 2. The Secretary of the Interior may make such provisions in the Department of the Interior as he may deem appropriate to administer the said act.

SEC. 3. This Executive order supersedes Executive Order No. 6979 of February 28, 1935, Executive Order No. 7756 of December 1, 1937 (2 F.R. 2664), Executive Order No. 9732 of June 3, 1946 (11 F.R. 5985), and paragraph (q) of section 1 of Executive Order No. 10250 of June 5, 1951 (16 F.R. 5385).

DWIGHT D. EISENHOWER.

§ 715k. Saving clause

If any provision of this chapter, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 22, 1935, ch. 18, § 12, 49 Stat. 33.)

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part of act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

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717z. Emergency conversion of utilities and other facilities.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters

exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, §1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, §404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, §311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, §404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided*, *however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided*, *however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

(June 21, 1938, ch. 556, § 8, 52 Stat. 825.)

§ 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

(June 21, 1938, ch. 556, § 9, 52 Stat. 826.)

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section

717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act,

the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibil-

1978 falls during a period when the Continuity of Operations Plan is activated and, following such activation, when Commission operations are suspended in whole or in relevant part, and also during the 14 days thereafter, the Commission will not initiate such an enforcement action under section 210(h)(2) of the Public Utility Regulatory Policies Act of 1978 and the petitioner may itself bring its own enforcement action in the appropriate court.

(j) *Chairman's and Commission's authority to modify deadlines and timeframes*. During periods when the Continuity of Operations Plan is activated and, following such activation, when Commission operations are suspended in whole or in part and also during the 14 days thereafter, the Chairman (or the Chairman's delegate pursuant to §376.205, as appropriate), may shorten, and the Commission (or the Commission's delegate pursuant to §376.204, as appropriate) may extend, with respect to the matters addressed in this section, as appropriate:

(1) The time periods and dates for filings with the Commission, a decisional employee, or a presiding officer;

(2) The time periods and dates for reports, submissions and notifications to the Commission, a decisional employee, or a presiding officer; and

(3) The time periods and dates for actions by the Commission, a decisional employee, or a presiding officer.

[Order 765, 77 FR 43490, July 25, 2012]

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Sec.

380.1 Purpose.
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380.13 Compliance with the Endangered Species Act.
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380.15 Siting and maintenance requirements.
380.16 Environmental reports for section 216 Federal Power Act Permits.
APPENDIX A TO PART 380—MINIMUM FILING REQUIREMENTS FOR ENVIRONMENTAL REPORTS UNDER THE NATURAL GAS ACT

AUTHORITY: 42 U.S.C. 4321–4370h, 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

SOURCE: Order 486, 52 FR 47910, Dec. 17, 1987, unless otherwise noted.

§380.1 Purpose.

The regulations in this part implement the Federal Energy Regulatory Commission's procedures under the National Environmental Policy Act of 1969 (NEPA). These regulations supplement the regulations of the Council on Environmental Quality, 40 CFR parts 1500 through 1508. The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 756, 77 FR 4895, Feb. 1, 2012]

§380.2 Definitions and terminology.

For purposes of this part—

(a) *Categorical exclusion* means a category of actions described in §380.4, which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. The Commission may decide to prepare environmental assessments for the reasons stated in §380.4(b).

(b) *Commission* means the Federal Energy Regulatory Commission.

(c) *Council* means the Council on Environmental Quality.

(d) *Environmental assessment* means a concise public document for which the Commission is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid the Commission's compliance with NEPA when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary. Environmental assessments must include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) *Environmental impact statement* (EIS) means a detailed written statement as required by section 102(2)(C) of NEPA. DEIS means a draft EIS and FEIS means a final EIS.

(f) *Environmental report* or ER means that part of an application submitted to the Commission by an applicant for authorization of a proposed action which includes information concerning the environment, the applicant's analysis of the environmental impact of the action, or alternatives to the action required by this or other applicable statutes or regulations.

(g) *Finding of no significant impact* (FONSI) means a document by the Commission briefly presenting the reason why an action, not otherwise excluded by §380.4, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It must include the environmental assessment or a summary of it and must note other environmental documents related to it. If the assessment is included, the FONSI need not repeat any of the discussion in the assessment but may incorporate it by reference.

§380.3 Environmental information to be supplied by an applicant.

(a) An applicant must submit information as follows:

(1) For any proposed action identified in §§380.5 and 380.6, an environmental report with the proposal as prescribed in paragraph (c) of this section.

(2) For any proposal not identified in paragraph (a)(1) of this section, any environmental information that the Commission may determine is necessary for compliance with these regulations, the regulations of the Council, NEPA and other Federal laws such as the Endangered Species Act, the National Historic Preservation Act or the Coastal Zone Management Act.

(b) An applicant must also:

(1) Provide all necessary or relevant information to the Commission;

(2) Conduct any studies that the Commission staff considers necessary or relevant to determine the impact of the proposal on the human environment and natural resources;

(3) Consult with appropriate Federal, regional, State, and local agencies during the planning stages of the proposed action to ensure that all potential environmental impacts are identified. (The specific requirements for consultation on hydropower projects are contained in §4.38 and §16.8 of this chapter and in section 4(a) of the Electric Consumers Protection Act, Pub. L. No. 99–495, 100 Stat. 1243, 1246 (1986));

(4) Submit applications for all Federal and State approvals as early as possible in the planning process; and

(5) Notify the Commission staff of all other Federal actions required for completion of the proposed action so that the staff may coordinate with other interested Federal agencies.

(c) *Content of an applicant's environmental report for specific proposals*—1) *Hydropower projects.* The information required for specific project applications under part 4 or 16 of this chapter.

(2) *Natural gas projects.* (i) For any application filed under the Natural Gas Act for any proposed action identified in §§380.5 or 380.6, except for prior notice filings under §157.208, as described in §380.5(b), the information identified in §380.12 and Appendix A of this part.

(ii) For prior notice filings under §157.208, the report described by §157.208(c)(11) of this chapter.

(3) *Electric transmission project.* For pre-filing requests and applications filed under section 216 of the Federal

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on March 30, 2021. Participants in the case will be served by the appellate CM/ECF system.

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